

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID JOHNSON,

Plaintiff,

v.

STATE OF NEVADA *ex rel.* BOARD
OF PRISON COMMISSIONERS, *et al.*,

Defendants.

3:11-cv-00487-HDM-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

July 10, 2013

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for summary judgment (#60) and defendants' cross-motion for summary judgment (#66).¹ Defendants opposed plaintiff's motion for summary judgment (#75) and plaintiff replied (#96). Plaintiff opposed defendants' cross-motion for summary judgment (#86) and defendants replied (#92). The court has thoroughly reviewed the record and recommends that plaintiff's motion for summary judgment (#60) be denied, and defendants' cross-motion for summary judgment (#66) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff David Johnson ("plaintiff"), a *pro se* inmate, is currently incarcerated at Lovelock Correctional Center ("LCC") in the custody of the Nevada Department of Corrections ("NDOC") (#14). Plaintiff brings his civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that defendants violated his First Amendment right to freely exercise his religion, his statutory rights

¹ Refers to the court's docket numbers.

1 under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), his Fourteenth
 2 Amendment right to equal protection, and his religious rights under the Nevada Constitution.² *Id.*
 3 The court screened the complaint pursuant to 28 U.S.C. § 1915A, and permitted plaintiff’s First
 4 Amendment free exercise claim, RLUIPA claim, and Fourteenth Amendment equal protection claim
 5 to proceed (#13, p. 7). The remaining defendants in this litigation are Brian Sandoval, in his
 6 capacity as a commissioner on the Board of State Prison Commissioners (“BPC”); Ross Miller, a
 7 commissioner on the BPC; Catherine Cortez Masto, a commissioner on the BPC; James Cox, NDOC
 8 Director; Don Helling, former NDOC Deputy Director; Robert LeGrand, Warden of LCC; Tara
 9 Carpenter, former Associate Warden of LCC; Bruce Harkreader, Correctional Case Work Specialist
 10 II at LCC; Jim Gibbons, former member of the BPC; and Howard Skolnik, former NDOC Director
 11 (#66, pp. 1-2). Plaintiff sues all defendants in both their individual and official capacities for
 12 damages, declaratory relief and injunctive relief (#14, pp. 2-4, 32-33).

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 15 Plaintiff alleges that NDOC has not officially recognized his Orthodox Christian faith group,
 16 the effect of which denies plaintiff a religious dietary accommodation, in the form of a kosher meat
 17 diet, and a reasonable opportunity to congregate for corporate prayer (#86, p. 2). Plaintiff alleges
 18 that defendants’ failure to accommodate his religious dietary and corporate prayer requests violate
 19 his First Amendment right to freely exercise his religion, his statutory rights under RLUIPA, and his
 20 Fourteenth Amendment right to equal protection.
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23 On November 20, 2009, plaintiff submitted a Faith Group Affiliation Declaration, identifying
 24 himself as a member of the Orthodox Christian faith group (#66-36, p. 1). At that time, NDOC did
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 28 ² Article 1 of the Nevada Constitution concerns the free exercise of religion, and is a corollary to the First Amendment to the United States Constitution. *See Jacobs v. Clark County Sch. Dist.*, 373 F.Supp.2d 1162, 1170 n.1 (D.Nev. 2005). Thus, the court analyzes plaintiff’s religious rights claims arising under the Nevada Constitution and the United States Constitution under the same standard.

not include Orthodox Christianity on its list of recognized religions (#14, p. 7).³ On December 11, 2009, plaintiff submitted a Request for Accommodation of Religious Practices (DOC 3505), asking NDOC's Religious Review Team ("RRT") to officially recognize his Orthodox Christian faith group (#66-36, pp. 2-6).

Kosher Diet:

NDOC's Administrative Regulation ("AR") 810, effective July 8, 2008, governs religious faith group activities and programs. AR 810 provides that NDOC institutions will take reasonable steps to meet the needs of religious faith groups, such as diets, holy days, study groups, and special services and ceremonies.⁴ AR 814, effective November 15, 2004, governs NDOC's kosher diet policy.⁵ AR 814 provides that an inmate may receive a religious dietary accommodation if the inmate establishes "his suitability for a religious diet through a hereditary or social connection to the religious practice, or substantial philosophical understanding of the religion and its dietary practices" (#75-3, p. 9).

LCC's Operational Procedure ("OP") 810, effective May 2009, governs LCC's kosher diet policy. OP 810.19(2)(A) states that LCC will provide a kosher diet to verified conservative or orthodox Jewish inmates (#75-4, p. 10). If an inmate wishes to receive a kosher diet, he must have a faith group declaration on file stating that he is Jewish, submit a kite to LCC's Chaplain requesting kosher meals, and provide the contact information for an appropriate outside organization which can verify that the inmate is either a conservative or orthodox Jew. *Id.* If the inmate meets these

³ Plaintiff alleges that prior to NDOC's Administrative Regulation ("AR") 810's revision on July 8, 2008, NDOC included Orthodox Christianity on its list of recognized religions (#14, p. 13). The court notes that the current version of AR 810.2, effective August 1, 2011, also does not include Orthodox Christianity on its list of recognized religions (NDOC AR 810.2, found at <http://www.doc.nv.gov/sites/doc/files/pdf/ar/AR810.2.pdf>).

⁴ NDOC AR 810 is found at <http://www.doc.nv.gov/sites/doc/files/pdf/ar/AR810.pdf>, p. 2.

⁵ AR 814 was revised on June 17, 2012. However, the 2004 version is applicable to this suit.

requirements, he will appear before the appropriate LCC officials to complete the LCC Kosher Meals Tracking Form, and will begin the process of receiving kosher meals.⁶ *Id.*

On January 27, 2010, plaintiff submitted an inmate kite requesting certain dietary restrictions (no eggs or dairy products) for the upcoming Lenten fast (#66-36, p. 7). Plaintiff was informed that the culinary offered “meatless Fridays” for anyone signing up for Lent, but that specific dietary requests would not be accommodated. *Id.* On April 15, 2010, April 21, 2010, May 17, 2010, May 27, 2010 and August 9, 2010, plaintiff submitted inmate kites requesting a kosher diet. *Id.* at 28-29, 32-33, 54. LCC Chaplain Richard Garcia responded to plaintiff’s requests and informed him that the only inmates who were approved to receive kosher meals were Orthodox or Conservative Jews who could provide proof of Jewish ethnicity or a formal conversion process from a recognized Jewish organization. *Id.*

On June 14, 2010, plaintiff submitted Grievance Log No. 2006-28-99827, complaining that NDOC’s failure to recognize his Orthodox Christian faith group violated his religious rights, and that NDOC’s kosher diet policy was discriminatory (#66-36, pp. 15-22).⁷ On June 23, 2010, defendant Harkreader responded to plaintiff’s informal grievance, stating:

I have spoken with Chaplain Garcia regarding your grievance. As you have been informed, you may practice any religion that you wish, but only the ones recognized by the Department may order items particular to their religious beliefs. Orthodox Christian is not recognized by the Department and [the Department] has no obligation to provide special diets or authorize religious items for its practice.

Id. at 16. Thereafter, plaintiff exhausted Grievance Log No. 2006-28-99827, which was denied at all levels. *Id.* at 11-14.

⁶ Defendants admit that OP 810.19 should be revised to accord with AR 814, and state that the appropriate NDOC authorities are in the process of revising OP 810 (#75, p. 19, n. 42). However, defendants do not cite any authority for this assertion.

⁷ Plaintiff alleges that defendant Helling approved plaintiff’s DOC 3505 request on August 5, 2010 (#14, p. 10). However, this evidence is not in the record before the court.

1 On August 18, 2010, plaintiff submitted Grievance Log No. 2006-29-03717, complaining
2 that LCC's OP 810 violated his religious rights (#66-36, pp. 45-51). Plaintiff explained that
3 Orthodox Christian practitioners adhere to a kosher diet, and argued that OP 810's kosher meal
4 restrictions were race-based and discriminatory. *Id.* at 48-49. On September 1, 2010, defendant
5 Harkreader responded to plaintiff's informal grievance, stating, "This is the exact same issue as you
6 filed in GR-2006-28-99827." *Id.* at 46. Thereafter, plaintiff exhausted Grievance Log No. 2006-29-
7 03717, which was denied at all levels. *Id.* at 35-46.

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9 By January 27, 2010, plaintiff was receiving NDOC's alternative meatless diet, although the
10 record is unclear as to the exact date plaintiff began to receive this diet (#66-1, p. 48; #66-36, p. 26).
11 On October 14, 2012, plaintiff asked to be removed from the alternative meatless diet, and he was
12 placed back on the mainline-menu diet (#75-2, p. 4; 75-2, ¶ 12). Plaintiff states that he asked to
13 switch back to the mainline-menu diet because inmates on the alternative meatless diet eat next-to-
14 last out of the three housing units, which leaves little fresh fruit for these inmates (#96, p. 21).
15 Plaintiff also states that he purchases his own oatmeal for breakfast, and that he purchases bread,
16 jelly and peanut butter for lunch, which allows plaintiff to trade his non-kosher meat for fresh fruit
17 and vegetables. *Id.*

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20 NDOC Chaplain James Stogner states that Orthodox Christians do not have a special dietary
21 standard; however, an adherent may observe a "meatless" diet from Great Lent through Easter, and
22 on Wednesdays and Fridays throughout the calendar year (#66-33, ¶ 31). Chaplain Stogner states
23 that the tenets of Orthodox Christianity do not require its adherents or practitioners to observe a
24 kosher diet or kosher meat diet. *Id.* at ¶ 34. While an Orthodox Christian practitioner may prefer to
25 observe a kosher diet or kosher meat diet for personal reasons, consuming non-kosher food does not
26 violate the religious tenets of Orthodox Christianity. *Id.* at ¶ 37. Thus, Chaplain Stogner opines that
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1 NDOC's refusal to provide an Orthodox Christian inmate with a kosher diet or kosher meat diet does
2 not prohibit the free exercise of that inmate's Orthodox Christian beliefs or substantially deprive that
3 inmate of his religious exercise. *Id.* at ¶ 38.⁸

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5 Chaplain Stogner also states that while NDOC's Religious Review Team ("RRT") has
6 recommended that Orthodox Christianity be added to NDOC's list of recognized faith groups, the
7 RRT has not recommended a kosher diet or kosher meat diet for these practitioners. *Id.* at ¶ 72.
8 Instead, the RRT has recommended a meatless diet from Great Lent through Easter, as well as all
9 Wednesdays and Fridays throughout the calendar year. *Id.*

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11 LCC Warden Robert LeGrand states that in May 2010, NDOC's religious diet policy limited
12 the provision of kosher meals to Orthodox or Conservative Jews who could prove either Jewish
13 ethnicity or participation in a formal conversion process (#66-35, ¶ 10). Since that time, NDOC has
14 revised its policy to include other faith groups. *Id.* By March 2012, NDOC permitted inmates to
15 receive a kosher diet if their sincere religious dietary needs could not be met by the mainline-menu
16 diet without prohibiting the free exercise of their religion or substantially burdening their religious
17 exercise. *Id.*

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19 Warden LeGrand states that from an institutional perspective, providing kosher meals to
20 inmates who do not require kosher meals creates problems. *Id.* at ¶ 11. For example, inmates might
21 hide the sealed kosher food containers on their persons, and transport these containers back to their
22 cells. *Id.* This could promote subsequent inmate-bartering of kosher food, which is prohibited for
23 safety and security reasons. This could also promote subsequent improper food storage, which
24 implicates health issues. *Id.* Further, inmate-envy issues might arise, in which one inmate is

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28 ⁸ Chaplain Stogner states that consuming meat from an animal that has had its blood drained is a religious tenet rooted in Orthodox Christianity and is parallel to one component of Kosher law. However, requiring meat to be kosher is not rooted in Orthodox Christianity. *Id.* at ¶ 55.

1 perceived to have something unfairly that another inmate cannot have. This could lead to an
2 increased risk of hostility, violence and threats upon those inmates or staff. *Id.* Finally, the prison
3 has scarce economic resources, and kosher meals are much more expensive than mainline-menu
4 meals. *Id.*

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6 NDOC's Chief of Purchasing and Inmate Services, Dawn A. Rosenberg, states that NDOC
7 inmates may choose between the mainline-menu diet, which is a regular diet that contains non-
8 kosher meat products (including beef, chicken and fish), and the alternative meatless diet, which
9 does not contain beef or chicken products (#75-1, ¶¶ 7, 9). Certain inmates may also qualify for a
10 kosher diet (for religious reasons) or a medical diet (as prescribed by a doctor). *Id.* at 2, n.1. In
11 March 2012, NDOC's "Current Kosher Menu" ("CKM") was phased out upon implementation of
12 the "Common-Fare/Religious Diet Menu" ("CFM") (#66-34, ¶ 2).

13
14 In Fiscal Year 2012, NDOC's budget for providing non-kosher, mainline meals was
15 approximately \$2.43 per inmate, per day. *Id.* at ¶ 7. In Fiscal Year 2012, NDOC's food cost for
16 providing kosher meals under the CKM was approximately \$16.35 per inmate, per day, per two-
17 week-cycle-cost average. *Id.* at ¶ 8. From calendar year 2009 to calendar year 2012, the ratio of the
18 cost difference between providing the mainline-menu meals to providing the CKM meals has been
19 approximately the same—with the CKM meals costing six to seven times more than the non-kosher,
20 mainline meals. *Id.* at ¶ 9. Currently, the food cost of providing kosher meals to NDOC inmates
21 under the CFM is approximately \$8.76 per inmate, per day, per two-week-cycle-cost average. *Id.* at
22 ¶ 10.
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1 Corporate Prayer:

2 OP 810.01 provides that all inmates will have access to religious programs, limited by
3 custody levels and security concerns (#75-4, p. 4). OP 810.01 also provides that religious
4 scheduling and resources will be allocated in proportion to inmate population needs. *Id.*

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6 On August 1, 2010, plaintiff submitted an inmate kite to Chaplain Garcia, which stated:
7 It is the practice of the Orthodox Christian Church and its members to pray seven
8 times a day. These are done corporately in services held at the specified times for the
9 specific office. Whereas we now have enough Orthodox Christians in P.S. we are
10 requesting a place and times for accommodating this practice. These services and
11 times (excluding midnight for security reasons) are as follows: Daily Matins,
followed by the 1st Hour—6 a.m., the 3rd Hour—9 a.m., the 6th Hour—12 noon, the
9th Hour—3 p.m., Vespers—6 p.m. (or before evening meal), Small Compline—9
p.m. or before bed, Midnight office.

12 (#66-36, p. 78). Chaplain Garcia responded to plaintiff's kite, stating:

13 Thank you, Mr. Johnson. I staffed this request with Warden Carpenter. Considering
14 the necessity to pray seven times a day versus penological interests and security, you
15 are free to pray in your cell, as setting aside a place other than a cell for six to seven
meetings a day is unfeasible here in this prison environment.

16 *Id.* On August 10, 2010, plaintiff submitted an inmate kite to defendant Carpenter, asking her to
17 articulate what “penological interests” and “security concerns” warranted “placing not merely a
18 substantial burden, but an outright prohibition on the free exercise of [plaintiff's Orthodox Christian
19 corporate prayer]?” *Id.* at 79. Defendant Carpenter informed plaintiff that she would review his
20 request at the next religious meeting. *Id.* On August 25, 2010, plaintiff submitted a second inmate
21 kite to defendant Carpenter, once again asking her to state “penological interests” and “security
22 concerns.” *Id.* at 80. Defendant Carpenter informed plaintiff that his request had been discussed at
23 the religious meeting, and had been denied due to limited staffing, supervision and space. *Id.* On
24 August 31, 2010, plaintiff submitted a third inmate kite to defendant Carpenter, informing her that
25 the seven hours of liturgical prayer “does not equate to 420 minutes it is more properly 7 times per
26 day.” *Id.* at 81. Plaintiff argued that his DOC 3505 request had been approved, and that he believed
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1 Orthodox Christian corporate prayer could be held in the activity rooms without staff supervision.

2 *Id.* Defendant Carpenter responded:

3 An RRT was submitted for your religion to be recognized by AR 810. Which it has
4 not yet been approved. They are adding it eventually.

5 *Id.*

6 On September 8, 2010, plaintiff submitted Grievance Log No. 2006-29-04879, complaining
7 that Chaplain Garcia and defendant Carpenter discriminatorily denied his request for “the seven
8 liturgical hours of prayer as required by the Orthodox religion” (#66-36, p. 67). On October 26,
9 2010, plaintiff submitted a first level grievance pursuant to AR 740, as prison officials failed to
10 respond to plaintiff’s informal grievance within the specified time limits. *Id.* at 60-61. Defendant
11 Carpenter rejected plaintiff’s informal level grievance and first level grievance on the grounds these
12 grievances were duplicative of Grievance Log No. 2006-28-99827. *Id.* at 58-59. On November 14,
13 2010, plaintiff filed a second level grievance, explaining that Grievance Log No. 2006-29-04879
14 concerned plaintiff’s request for “corporate liturgical prayer.” *Id.* at 55-57. Defendant Helling
15 rejected plaintiff’s second level grievance. *Id.* at 56.

16 Chaplain Stogner states that Orthodox Christians practice both personal worship and group
17 worship (known as corporate prayer); however, there is no customary expectation that group worship
18 will occur in excess of once per week and on special holy days (#66-33, ¶ 20). For laity (non-
19 monks, non-clergy and non-members of monastic orders), observing group worship on a daily basis
20 is not a requirement, tenant or custom of the Orthodox Christian religion. *Id.* at ¶ 21. Chaplain
21 Stogner opines that although an Orthodox Christian practitioner may prefer to pursue group worship
22 each day during the seven liturgical hours of prayer, this preference is not required by the Orthodox
23 Christian religion. *Id.* at ¶ 24. Chaplain Stogner also opines that even though an inmate may claim
24 he is required to participate in group worship each day during the seven liturgical hours of prayer,
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1 such prayer can be accomplished through personal worship. *Id.* at ¶ 22. Thus, Chaplain Stogner
2 contends that NDOC's refusal to accommodate an inmate's request for corporate prayer seven times
3 per day does not prohibit the free exercise of that inmate's Orthodox Christian religion or
4 substantially deprive that inmate of his religious exercise. *Id.* at ¶ 23.

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6 Chaplain Stogner states that he expects NDOC to add Orthodox Christianity to AR 810's
7 Faith Group Overview chart when the regulation is next published, and that the RRT has
8 recommended including a weekly Orthodox Christian group worship service—subject to scheduling
9 approval. *Id.* at ¶¶ 57, 72. In the meantime, Chaplain Stogner opines that the mere fact that NDOC
10 does not officially recognize the Orthodox Christian faith group does not substantially burden
11 plaintiff's religious exercise because the practice of Orthodox Christianity can be subsumed under
12 the larger grouping of "Christian." *Id.* at ¶ 58. As an example, Chaplain Stogner points out that
13 NDOC does not officially recognize the United Methodist Church, the Southern Baptist Church or
14 the Assembly of God. *Id.* at ¶ 59. However, inmate adherents of these particular faith groups may
15 declare their religious affiliation as "Christian" and then participate in whatever personal religious
16 devotions and group religious services they may choose. *Id.*

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19 Chaplain Stogner also states that any inmate may ask the chaplain to include additional
20 religious services in the Chapel schedule, as approval is not conditioned on whether NDOC
21 officially recognizes the particular religion on its Faith Group Overview chart. *Id.* at ¶ 61. Plaintiff
22 could have (and still may) request an Orthodox Christian religious service to be included in the
23 Chapel schedule. *Id.* Further, simply because a particular faith group is included on NDOC's Faith
24 Group Overview chart does not guarantee that a group worship service will be scheduled for that
25 particular religion at any given institution. *Id.* at ¶ 62. Group worship services are scheduled based
26 on inmate participation and available space. *Id.* at ¶ 63. As a general rule, a group worship service
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1 may be scheduled when there are at least three interested inmate participants. *Id.* Because Chapel
2 space is limited, scheduling preference is given to those faith groups with the greatest number of
3 inmate participants. *Id.* Thus, scheduling is based on a secular consideration (maximizing utility for
4 the greatest number of inmates)—not a religious consideration (favoring one religion over another).
5 *Id.* Further, regardless of faith group, inmates may keep religious observances in their cells, request
6 one-on-one clergy visits (subject to clergy availability), obtain approved religious print materials,
7 and borrow the books and materials in the Chapel library. *Id.* at ¶¶ 68-70.

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9 Depending on institutional requirements, NDOC staff or an approved religious volunteer may
10 be required to supervise inmate worship services. *Id.* at ¶ 65. Many institutions also manage several
11 inmate populations—such as general population, protective segregation, administrative segregation,
12 disciplinary segregation and various infirmary and mental health units—which are generally not
13 permitted to co-mingle for safety, security and custody reasons. *Id.* at ¶ 66. Accordingly, available
14 facilities must be managed in such a manner as to permit access to all inmate groups. *Id.* at ¶ 67.

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16 Warden LeGrand states that from an institutional perspective, providing plaintiff with the
17 means to attend group worship services multiple times per day would undermine prison safety,
18 security, discipline and order (#66-35, ¶ 14). He also states that this accommodation would waste
19 scarce economic resources, including the staff allocation. *Id.* LCC's designated religious area is the
20 prison chapel. *Id.* at ¶ 19. Housing Unit 3B's activity room is currently used for numerous purposes
21 throughout the day, including educational classes, college classes, self-help courses (C-base,
22 tutoring, AA/NA, STOP), barber shop and the laundry pass-out area. *Id.* at ¶ 25. If LCC permitted
23 plaintiff's religious group to use the Unit 3B activity room multiple times per day (plaintiff requests
24 forty-nine times per week), then LCC would be forced to cease using this area for other scheduled
25 activities, which would affect many other inmates. *Id.* at ¶¶ 26-27. In addition, if LCC permitted
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1 plaintiff's religious group to use the activity room to hold group prayer meetings, then LCC would
2 also have to allow all other religious groups to use the activity room. *Id.* at ¶ 28. This would
3 significantly reduce education, mental health services and other services in the protective
4 segregation ("PS") unit,⁹ which could create inmate resentment and could increase the risk of harm
5 to inmates and staff. *Id.* at 29. Accordingly, Warden LeGrand opines that it would be unacceptable
6 to permit a small group of inmates to interrupt the scheduled use of the activity room forty-nine
7 times per week. *Id.* Further, due to LCC's reduced staffing levels in the evening hours, there are
8 many nights where there is no floor-officer in the PS unit. *Id.* at ¶ 30. Thus, accommodating
9 plaintiff's request for group prayer in the evening would require prison administrators to pull staff
10 from other critical areas or to hire overtime staff to safely supervise these activities. *Id.* at ¶ 31.

13 Defendants move for summary judgment on six grounds: (1) defendants did not violate
14 plaintiff's First Amendment right to freely exercise his religion by refusing to accommodate
15 plaintiff's requests for a kosher diet and corporate prayer (#66, p. 2, n. 3, 22-24, 26, n. 46; #75, pp.
16 7-8, 20, n. 44); (2) defendants did not violate plaintiff's statutory rights under RLUIPA by refusing
17 to accommodate plaintiff's requests for a kosher diet and corporate prayer (#66, pp. 26-27); (3)
18 defendants did not violate plaintiff's Fourteenth Amendment right to equal protection by refusing to
19 accommodate plaintiff's requests for a kosher diet and corporate prayer (#66, pp. 20, 24-25); (4)
20 defendants are entitled to qualified immunity (#66, p. 30; #75, p. 29); (5) the BPC defendants'
21 (Gibbons, Sandoval, Miller and Cortez Masto) indirect involvement is insufficient to state a claim
22 under 42 U.S.C. § 1983 (#66, p. 19); and (6) defendants personal participation cannot be predicated
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26 ⁹ There are approximately 1650 inmates incarcerated at LCC. Within this population there are approximately 322
27 inmates housed in the PS units. *Id.* at ¶¶ 15-16. Plaintiff is a "close custody" inmate housed in PS Unit 3B, due to
28 confidential safety concerns. *Id.* at ¶ 18. Due to security concerns dealing with the protection of PS inmates, LCC
provides inmate services to PS inmates as one group, and to general population ("GP") inmates as another group. *Id.* at ¶
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1 on the denial of a grievance because inmates have no “legitimate claim of entitlement to a grievance
2 procedure.” *Id.* at 20.

3 Plaintiff also moves for summary judgment and contends that: (1) NDOC’s AR 810
4 effectively requires approval of plaintiff’s faith group before NDOC will allow plaintiff to practice
5 his religion (#60, p. 19); (2) plaintiff’s requests for a kosher meat diet and participation in corporate
6 prayer are sincerely held religious beliefs mandated by the Orthodox Christian religion (#60-1, pp. 1-
7 2; #86, pp. 3, 7-9, 31); (3) defendants’ refusal to recognize plaintiff’s faith group substantially
8 burdens his religious exercise (#60, p. 19); and (4) plaintiff’s Orthodox Christian faith group is
9 similarly situated to other religious groups, and plaintiff was denied equal protection of the law
10 based on his race and religion (#60, p. 22; #86, p. 18; #96, p. 17).

13 As a preliminary matter, the court notes that plaintiff is proceeding *pro se*. “In civil cases
14 where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford
15 plaintiff the benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623
16 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

18 II. DISCUSSION & ANALYSIS

19 A. Legal Standards

20 1. 42 U.S.C. § 1983

21 Title 42 U.S.C. § 1983 “provides a federal cause of action against any person who, acting
22 under color of state law, deprives another of his federal rights.” *Conn v. Gabbert*, 526 U.S. 286, 290
23 (1999). Section 1983 does not offer any substantive rights, but provides procedural protections for
24 federal rights granted elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). To prove liability
25 under § 1983, a plaintiff must: (1) show that a person acting under color of state law engaged in
26 some type of conduct, which (2) deprived the plaintiff of some right, privilege or immunity secured
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1 by the Constitution or federal statutory law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overturned*
2 *on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

3 **2. Summary Judgment Standard**

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5 Summary judgment allows courts to avoid unnecessary trials where there are no factual
6 disputes. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The
7 court will grant summary judgment if no genuine issues of material fact remain in dispute and the
8 moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court must view all
9 evidence and any inferences arising from the evidence in the light most favorable to the nonmoving
10 party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme Court has
11 noted:

13 [W]e must distinguish between evidence of disputed facts and disputed matters of
14 professional judgment. In respect to the latter, our inferences must accord deference
15 to the views of prison authorities. Unless a prisoner can point to sufficient evidence
16 regarding such issues of judgment to allow him to prevail on the merits, he cannot
prevail at the summary judgment stage.

17 *Beard v. Banks*, 548 U.S. 521, 530 (2006) (internal citations omitted). Where reasonable minds
18 could differ on the material facts at issue, however, summary judgment should not be granted.
19 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

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21 The moving party bears the burden of informing the court of the basis for its motion, and
22 submitting authenticated evidence to demonstrate the absence of any genuine issue of material fact
23 for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Orr v. Bank of America*, 285 F.3d
24 764, 773-74 (9th Cir. 2002). Once the moving party has met its burden, the party opposing the
25 motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific
26 facts showing the existence of a genuine issue for trial. *Anderson*, 477 U.S. at 248. Rule 56(c)
27 mandates the entry of summary judgment, after adequate time for discovery, against a party who
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1 fails to make a showing sufficient to establish the existence of an element essential to that party's
 2 case, and upon which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

3 On summary judgment the court is not to weigh the evidence or determine the truth of the
 4 matters asserted, but must only determine whether there is a genuine issue of material fact that must
 5 be resolved by trial. *See Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).
 6 Nonetheless, in order for any factual dispute to be genuine, there must be enough doubt for a
 7 reasonable trier of fact to find for the plaintiff in order to defeat a defendant's summary judgment
 8 motion. *See Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).
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11 **B. Analysis**

12 **1. First Amendment Free Exercise Clause**

13 Convicted prisoners do not lose their First Amendment right to freely exercise their religion
 14 by virtue of their incarceration. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). However, "lawful
 15 incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . ."
 16 *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (quoting *Price v. Johnston*, 334 U.S. 266,
 17 285 (1948)). A prisoner's right to freely exercise his or her religion is necessarily limited by
 18 incarceration, and may be curtailed to achieve legitimate correctional goals or to maintain prison
 19 security. *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987) (per curiam).
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22 To merit protection under the Free Exercise Clause, a prisoner's religious claim must satisfy
 23 two basic criteria. *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). First, the prisoner's
 24 proffered belief must be "sincerely held." *Id.* Second, the claim must be "rooted in religious
 25 belief"—not in "purely secular" philosophical concerns. *Id.*; see *Shakur v. Schriro*, 514 F.3d 878,
 26 885 (9th Cir. 2008) (sincerity test set forth in *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994), and
 27 *Callahan*, 658 F.2d at 683, determines the applicability of the Free Exercise Clause). In *Shakur*, the
 28

1 Ninth Circuit made clear that “[i]t is not within the judicial ken to question the centrality of
2 particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those
3 creeds.” 514 F.3d at 884 (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989)). Instead, the
4 inquiry is “whether the [prisoner’s] beliefs . . . are sincerely held and whether they are, in this own
5 scheme of things, religious.” *United States v. Seeger*, 380 U.S. 163, 185 (1965); *Shakur*, 514 F.3d at
6 885 (inquiry is whether plaintiff sincerely believes eating kosher meat is consistent with his faith).
7 Determining if a prisoner’s claim is “rooted in religious belief” requires analyzing whether the
8 prisoner’s claim is related to his sincerely held religious belief. *Malik*, 16 F.3d at 333 (citation
9 omitted).

12 Even if a prison regulation impinges on an inmate’s constitutional rights, the regulation is
13 nevertheless valid if it is reasonably related to legitimate penological interests. *Shakur*, 514 F.3d at
14 883-84 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Under *Turner*, the court must balance
15 four factors to determine whether a prison regulation is reasonably related to legitimate penological
16 interests: (1) whether there is a “valid, rational connection” between the prison regulation and the
17 legitimate governmental interests put forward to justify the regulation; (2) whether prisoners retain
18 “alternative means of exercising the right” at issue; (3) the impact the requested accommodation will
19 have upon inmates, prison staff and the allocation of prison resources generally; and (4) whether
20 there are easy alternatives to the regulation which could be implemented at a minimal cost to
21 legitimate penological interests. See *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Turner*, 482 U.S. at
22 89-91. In evaluating a free exercise claim, courts must give “appropriate deference to prison
23 officials,” *O’Lone*, 482 U.S. at 349, because “the judiciary is ‘ill-equipped’ to deal with the difficult
24 and delicate problems of prison management.” *Thornburgh v. Abbot*, 490 U.S. 401, 407-08 (1989)
25 (citation omitted).

1 **a. Kosher Diet**

2 Plaintiff alleges that he sincerely believes he must consume kosher meat to maintain his
3 spirituality, and that this sincere belief is rooted in his Orthodox Christian religion (#60-1, pp. 1-2;
4 #86, p. 31). Plaintiff claims that Genesis 9:3 and Romans 14:2 mandate that plaintiff partake in a
5 meat-based diet (#86, p. 34), and that Acts 15:22-29 provides that Christians are to “abstain from
6 things offered to idols, from blood, from things strangled, and from sexual immortality.” *Id.* at 7.
7 Thus, plaintiff concludes he is required to consume kosher meat as a tenet of his Orthodox Christian
8 religion.
9

10 Defendants contend that they are not required to provide plaintiff with a kosher diet or a
11 kosher meat diet. Defendants argue that plaintiff does not sincerely believe that he requires a kosher
12 diet or kosher meat diet, and that his request is not rooted in the Orthodox Christian religion (#66,
13 pp. 22, 26, n. 46; #75, pp. 7-8). Defendants also argue that NDOC’s former policy of providing
14 kosher meals only to Jewish inmates is reasonably related to the legitimate penological interests of
15 conserving scarce fiscal resources and preventing inmate envy (#66, p. 23; #75, p. 20, n.44).¹⁰
16

17 As a preliminary matter, the court notes that both plaintiff and defendants spent considerable
18 time and effort arguing whether a kosher diet or kosher meat diet is a tenet, requirement or mandate
19 of the Orthodox Christian religion. Plaintiff contends that Acts 15:22-29 supports his claim that
20 Orthodox Christians adhere to a kosher meat diet (#86, p. 7); whereas defendants rely on declaratory
21 evidence from NDOC Chaplain James Stogner, who states that Orthodox Christians are not required
22 to observe a kosher diet or kosher meat diet (#66-33, ¶¶ 34-37). Both sides have also referred the
23 court to out-of-circuit case law. Plaintiff cites *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987),
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27 ¹⁰ Finally, defendants argue that plaintiff’s request for a kosher meat diet is unnecessary because all livestock sold for
28 human consumption in the United States is humanely slaughtered, and the blood is drawn at the time of slaughtering.
Defendants cite varying provisions of the United States Code and Code of Federal Regulations for this contention (#66,
p. 22-23, n. 38; #75, p. 8).

1 in which the Eleventh Circuit found that the evidence supported Martinelli's claim that eating kosher
2 meats was a Greek Orthodox religious practice. *Id.* at 1504-05. Likewise, defendants cite *Guzzi v.*
3 *Thompson*, 470 F.Supp.2d 17 (D.Mass. 2007), in which the District of Massachusetts found that
4 Guzzi's purported right to a kosher diet did not meet RLUIPA's statutory definition of "religious
5 exercise," as Guzzi was an Orthodox Catholic—not a Jew. *Id.* at 25-26 ("While keeping kosher
6 within the practice of various sects of Judaism constitutes a religious exercise, keeping kosher itself
7 is not a religion.").

8
9 Although plaintiff and defendants disagree as to the appropriate religious diet for an
10 Orthodox Christian, that is not the critical inquiry. The Ninth Circuit has found that inmates "have
11 the right to be provided with food sufficient to sustain them in good health that satisfies the dietary
12 laws of their religion." *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (citing *McElyea*, 833 F.2d at
13 198). However, the Ninth Circuit has also made clear that "[i]t is not within the judicial ken to
14 question the centrality of particular beliefs or practices to a faith, or the validity of particular
15 litigants' interpretations of those creeds.'" *Shakur*, 514 F.3d at 884 (citation omitted). Instead, the
16 inquiry is "whether the [prisoner's] beliefs . . . are sincerely held and whether they are, in his own
17 scheme of things, religious." *Seeger*, 380 U.S. at 185. Here, the dispositive inquiry is not whether
18 the consumption of kosher food or kosher meats is a component, requirement or mandate of the
19 Orthodox Christian faith. Rather, the only relevant inquiry is whether plaintiff sincerely believes
20 that consuming kosher meats is a component of his Orthodox Christian faith. *See Shakur*, 514 F.3d
21 at 885 (the plaintiff's "sincere belief that he is personally required to consume kosher meat to
22 maintain his spirituality," although admittedly not required by his Muslim faith, was sufficient to
23 determine that the prison's refusal to provide him with a kosher meat diet implicated the Free
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Exercise Clause); *Thomas v. Review Bd. of Indiana Employment Security Sec. Division*, 450 U.S. 707, 716 (1981) (“[c]ourts are not arbiters of scriptural interpretation”).

The court has thoroughly reviewed the record, and concludes that plaintiff cannot show that his alleged need for a kosher meat diet is based on a “sincerely held” religious belief (*see* plaintiff’s deposition, #66-1, pp. 25-34). Plaintiff testified that an Orthodox Christian’s religious diet is not as strict as an Orthodox Jew’s kosher diet. *See* #66-1, p. 109 (in Orthodox Christianity “[i]t’s just the meats that have to be kosher”).¹¹ Plaintiff also testified that the Orthodox Christian religion requires its adherents to “abstain from blood and to abstain from things strangled, things offered to idols” and opined that “the only way that that can be guaranteed is through [kosher] certification.” *Id.* at 107. However, plaintiff could not articulate why he believed kosher certification was necessary to “abstain from blood” and “abstain from things strangled,” nor could plaintiff point to any religious source suggesting that Jewish kosher certifications comport with Orthodox Christian dietary tenets. *Id.* at 113-114. Plaintiff did not know which kosher certifying agencies his religion would accept, did not know how kosher meat was prepared, and he stated that his knowledge of kosher dietary requirements came from “case law.” *Id.* at 106-107, 120-121. Plaintiff simply articulated his unfounded belief that if kosher meat comports with the Jewish inmates’ dietary requirements, then it should satisfy the Orthodox Christian inmates’ dietary requirements.¹² *Id.* at 118-19.

¹¹ The court refers to the pagination in plaintiff’s deposition transcript.

¹² Plaintiff alleges that *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987), supports his claim that Orthodox Christian inmates are entitled to receive Jewish kosher meals. In *Martinelli*, the plaintiff was a Greek Orthodox inmate and claimed that he required a religious diet consisting of: fresh fruits, fresh vegetables, eggs, milk, cheese, peanut butter, jelly, fruit juices, cereals, appropriate meats, and/or a full kosher diet. 817 F.2d at 1501. The Magistrate Judge found that Martinelli had a sincere and deeply-rooted religious conviction that he should not eat pork, but found that the prison did not have to provide Martinelli with a full kosher diet. *Id.* at 1502. The district court also refused to order the prison to provide Martinelli with his requested food items or a full kosher diet. *Id.* at 1503. The Eleventh Circuit noted that the prison had conceded that Martinelli had a sincere belief that he should eat kosher meats, and found that Martinelli’s assertion that he should eat kosher meats as part of his Greek Orthodox religious practice was supported by the evidence. *Id.* at 1504-05. However, the court refused to order the prison to provide Martinelli with a kosher diet, as the prison’s dietary rules were rationally related to its legitimate interest in avoiding cost overruns. *Id.* at 1507, n. 29. This court notes that whether *plaintiff* has a “sincerely held” belief that he should adhere to a kosher diet as part of his Orthodox

1 When plaintiff was asked if his religious dietary requirements would be satisfied if the
2 prison's food supplier certified that the animals were slaughtered and not strangled, plaintiff replied,
3 "I don't believe so" because he would not trust that the food supplier was not acting in collusion
4 with the prison. *Id.* at 115-117. When plaintiff was asked if he ever bought non-kosher meat
5 products from the canteen, plaintiff replied, "not knowingly," then stated that he may have eaten
6 non-kosher meat offered by another inmate. *Id.* at 132. Finally, on October 14, 2012, plaintiff asked
7 to be removed from the alternative meatless diet, and to be placed back on the mainline-menu diet,
8 which contains non-kosher meat products (#75-2, p. 4).
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11 The court cannot find that plaintiff's "proffered belief [was] sincerely held." *See Callahan*,
12 658 F.2d at 683; *McElyea*, 833 F.2d at 198 (prison authorities may deny special religious diet if
13 inmate is not sincere in his religious beliefs). Plaintiff has failed to set forth any evidence to support
14 his claim that he sincerely believes he is required to observe a kosher diet or kosher meat diet to
15 maintain his Orthodox Christian spirituality. The mere fact that on October 14, 2012, plaintiff asked
16 to be returned to the mainline-menu diet, which contains non-kosher meat, militates against
17 plaintiff's claim. Plaintiff has also failed to set forth any evidence that LCC's kosher diet offerings
18 would actually satisfy his Orthodox Christian dietary requirements. The lack of such evidence not
19 only undermines plaintiff's assertion that a kosher diet or kosher meat diet is a tenant of Orthodox
20 Christianity, but also indicates to the court that plaintiff is not espousing a sincerely held religious
21 belief. Accordingly, the court finds that LCC's refusal to provide plaintiff with a kosher diet or
22 kosher meat diet does not implicate First Amendment free exercise protections.
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25 However, even assuming *arguendo* that the Free Exercise Clause is implicated, defendants'
26 actions are nevertheless "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at
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Christian religious practice is a case-specific determination. Therefore, *Martinelli* does not add to the court's analysis.

1 89. In determining whether a prison's culinary policy is reasonable, the court must balance the
2 degree of intrusiveness into the plaintiff's free exercise right against the costs of accommodation,
3 giving appropriate deference to prison officials' assessment. *Ward*, 1 F.3d at 877.

4
5 Under the first *Turner* factor, the court must determine whether there is a valid, rational
6 connection between the disputed regulation and the legitimate penological interest used to justify the
7 regulation. *See Turner*, 482 U.S. at 89-90 ("[A] regulation cannot be sustained where the logical
8 connection . . . is so remote as to render the policy arbitrary or irrational."). Here, the court finds
9 that there is a rational connection between LCC's policy of denying kosher meals to inmates whose
10 religions are not perceived to require them (such as Orthodox Christian inmates) and the prison's
11 legitimate interests. The prison has a legitimate interest in conserving scarce fiscal resources, in
12 preventing inmate-bartering of kosher food for safety and health reasons, and in preventing inmate-
13 envy to decrease the risk of violence and threats upon those inmates or staff (#66-35, ¶ 11).¹³ The
14 court finds that the first *Turner* factor weighs defendants' favor. *See Shakur*, 514 F.3d at 886
15 ("Although the marginal cost and administrative burden of adding Shakur to the roster of kosher-diet
16 inmates would be small or even negligible, we cannot conclude that no rational nexus exists between
17 [the prison's] dietary policies and its legitimate administrative and budgetary concerns. [The prison]
18 could rationally conclude that denying Muslim prisoners kosher meals would simplify its food
19 service and reduce expenditures.").

20
21 The second *Turner* factor requires the court to consider whether plaintiff has "alternative
22 means by which he can practice his religion" or is "denied all means of religious expression."
23 *Shakur*, 514 F.3d at 886. The relevant inquiry is not whether the inmate has an alternative means to

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28 ¹³ In *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993), the Ninth Circuit discounted the favoritism argument, since this effect "is present in every case that requires special accommodations for adherents to particular religious practices. While not irrelevant, it is not in itself dispositive." However, the court believes that avoiding the appearance of favoritism should be considered along with LCC's other asserted legitimate interests.

1 engage in the particular religious practice that he claims is being restricted; rather, the inquiry is
2 whether the inmate has been denied all means of religious expression. *O’Lone*, 482 U.S. at 351-52.
3 Further, where “other avenues” remain available for the plaintiff to exercise his religious rights,
4 courts should be particularly conscious of the deference owed to prison administrators. *Turner*, 482
5 U.S. at 90.
6

7 Here, the court finds that LCC provides plaintiff with alternative means by which he can
8 practice his religion. As far as plaintiff’s diet is concerned, plaintiff may participate in LCC’s
9 alternative meatless diet and supplement that diet with kosher meat products from the canteen. As
10 far as plaintiff’s general ability to practice his Orthodox Christian religion is concerned, the record
11 reflects that plaintiff may keep religious observances in his cell, may request a time-slot for
12 Orthodox Christian group worship in the chapel schedule, may request clergy visits, may attend
13 religious group services, may obtain approved religious print materials, and may borrow books and
14 other materials from the chapel library (#66-33, ¶¶ 61, 68-70).
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17 The evidence in the record indicates that plaintiff, as an Orthodox Christian inmate, has the
18 opportunity to participate in significant aspects of his religion and is not being denied all means of
19 religious expression. See *O’Lone*, 482 U.S. at 351-52; *Williams v. Morton*, 343 F.3d 212, 219 (3rd
20 Cir. 2003) (finding that the second *Turner* factor is satisfied if the prison allows daily prayer,
21 attendance at special weekly services and observance of religious holidays, even if inmates could eat
22 vegetarian meals but not Halal meat). The second *Turner* factor also weighs in defendants’ favor.
23

24 The third *Turner* factor requires the court to consider the “impact accommodation of the
25 asserted constitutional right will have on guards and other inmates, and on the allocation of prison
26 resources generally.” *Turner*, 482 U.S. at 90. The Supreme Court explained this factor as follows:
27 “When the accommodation of an asserted right will have a significant ‘ripple effect’ on fellow
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1 inmates or on prison staff, courts should be particularly deferential to the informed discretion of
2 corrections officers.” *Id.* (citation omitted). This court is aware that prison administration is an
3 “inordinately difficult undertaking that requires expertise, planning, and the commitment of
4 resources, all of which are peculiarly within the province of the legislative and executive branches of
5 government.” *Resnick v. Adams*, 348 F.3d 763, 770-71 (9th Cir. 2003).

7 Defendants have submitted evidence from NDOC’s Chief of Purchasing, Dawn A.
8 Rosenberg. Ms. Rosenberg states that from calendar year 2009 to calendar year 2012, kosher meals
9 cost six to seven times more than non-kosher, mainline-menu meals (#66-34, ¶ 9). If LCC were
10 forced to provide kosher meals to an increasingly large number of inmates, the institution would
11 clearly experience a financial burden that would affect “the allocation of prison resources,
12 generally.” *Turner*, 482 U.S. at 90. Here, however, the evidence indicates that there are only three
13 or four Orthodox Christian inmates incarcerated at LCC, and there is no indication whether these
14 other inmates would request a kosher diet. As such, defendants have not provided the court with any
15 evidence to support their assertion that providing plaintiff with a kosher diet would result in more
16 than a *de minimis* impact on LCC’s financial operations.

19 However, defendants have also submitted the declaration of LCC Warden Robert LeGrand,
20 who states that if LCC were forced to provide kosher meals to inmates with no legal right to receive
21 kosher meals, the prison could experience other problems. For example, inmates may hide the
22 sealed kosher food containers on their persons and transport these containers back to their cells,
23 which could promote inmate-bartering or improper food storage—both prohibited for safety, security
24 and health reasons (#66-35, ¶ 11). Warden LeGrand also states that inmate-envy issues may arise,
25 which could lead to an increased risk of violence and threats towards the “favored” inmates or prison
26 staff. *Id.* Because an exception for plaintiff may place burdens on prison resources with respect to
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1 safety and security, the court finds this factor weighs slightly in defendants' favor. *See Henderson v.*
2 *Terhune*, 379 F.3d 709, 714 (9th Cir. 2004).

3 The fourth *Turner* factor requires the court to consider whether "there are ready alternatives
4 to the prison's current policy that would accommodate [plaintiff] at *de minimus* cost to the prison."
5 *Shakur*, 514 F.3d at 887. "[T]he absence of ready alternatives is evidence of the reasonableness of a
6 prison regulation," *Washington v. Harper*, 494 U.S. 210, 225 (1990), while the existence of easy
7 alternatives may be "evidence that the [policy] is not reasonable but is an 'exaggerated response' to
8 prison concerns." *Turner*, 482 U.S. at 90-91. The burden of identifying a ready alternative is on the
9 plaintiff. *O'Lone*, 482 U.S. at 350; *Turner*, 482 U.S. at 90-91 (defendants need not "set up and then
10 shoot down every conceivable alternative method of accommodating the claimant's constitutional
11 complaint.") (citation omitted).

12 Plaintiff argues that LCC could accommodate his religious dietary request by simply
13 providing him with the standard kosher diet already enjoyed by Jewish inmates, instead of a special
14 kosher meat diet. Defendants argue that there are no ready alternatives to LCC's kosher diet policy
15 from the perspective that scarce resources are either conserved or they are not (#66, p. 23, n. 39). As
16 previously stated, the court cannot determine whether providing plaintiff with a kosher diet would
17 place more than a *de minimis* financial burden on LCC. However, it appears that LCC's refusal to
18 provide plaintiff with a kosher diet is justified by safety, security and health concerns. Accordingly,
19 the court finds that the fourth *Turner* factor weighs in defendants' favor. *See Resnick v. Adams*, 348
20 F.3d 763, 771 (9th Cir. 2003) (quoting *Turner v. Safely*, U.S. 482 at 85) ("When it comes to judicial
21 review of prison regulations, 'separation of powers concerns counsel a policy of judicial restraint.'").

22 Balancing these factors, the court finds that LCC's culinary policy regarding kosher meals is
23 reasonably related to the prison's legitimate penological interests. Because plaintiff does not present
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any factual issues concerning the reasonableness of the restriction, the court recommends summary judgment be granted in favor of defendants on plaintiff's First Amendment religious diet claim.

b. Corporate Prayer

Plaintiff alleges that he sincerely believes he must engage in corporate prayer to practice his Orthodox Christian religion (#86, p. 31), and that defendants' "total ban" on his ability to engage in corporate prayer is not justified by any legitimate or compelling penological interest (#86, p. 14). Plaintiff contends that the upper room in Housing Unit 3B could easily accommodate plaintiff's needs without additional supervision or staffing (#14, p. 18).

Defendants argue that plaintiff has requested corporate prayer seven times a day, and that this request is not rooted in the Orthodox Christian religion (#66, p. 23). Defendants also argue that there is a rational connection between LCC's policy of providing group services to as many inmates as practicable and denying plaintiff (and possibly one other inmate) access to the Chapel or Unit 3B activity room seven times per day. *Id.* at 23, n. 40.

As a preliminary matter, the court notes that plaintiff attempts to characterize defendants' rejection of plaintiff's request for group meeting space as a "total ban" on Orthodox Christian corporate prayer. This characterization is misleading. On August 1, 2010, plaintiff submitted an inmate kite requesting group prayer seven times per day at specified hours (Daily Matins, 1st Hour—6 a.m., 3rd Hour—9 a.m., 6th Hour—noon, 9th Hour—3 p.m., Vespers—6 p.m., Small Compline—9 p.m., and midnight) (#66-36, p. 78). Chaplain Garcia rejected plaintiff's request on the grounds that securing a group meeting space (other than plaintiff's cell) for seven meetings a day was unfeasible in the prison environment. *Id.* On September 8, 2010, plaintiff submitted Grievance Log No. 2006-29-04879, complaining that Chaplain Garcia and defendant Carpenter denied his request for "the seven liturgical hours of prayer as required by the Orthodox religion." *Id.* at 67. Accordingly,

1 defendants' denial of plaintiff's corporate prayer request cannot be characterized as a "total ban" on
2 Orthodox Christian group worship. Instead, the denial was simply a denial of plaintiff's request to
3 set aside meeting space for Orthodox Christian group worship *seven times per day at specified*
4 *hours*. Accordingly, the issue here is not whether plaintiff has a constitutional right to engage in
5 corporate prayer, but whether plaintiff can command group worship space seven times a day at
6 specified hours as a matter of right.

8 Plaintiff alleges that because corporate prayer is referenced in religious texts and because
9 there are seven liturgical hours in a day, engaging in corporate prayer at the seven liturgical hours is
10 required by plaintiff's Orthodox Christian religion. The evidence before the court is insufficient for
11 the court to say, with certainty, whether plaintiff sincerely believes he must participate in corporate
12 prayer seven times per day at the specified liturgical hours of prayer in order to practice his
13 Orthodox Christian religion. However, the court can say, with certainty, that *Turner* permits LCC to
14 encroach on any constitutional right implicated here.

16 As noted previously, under the first *Turner* factor, the court must determine whether there is
17 a valid, rational connection between the disputed regulation and the legitimate penological interest
18 used to justify the regulation. *See Turner*, 482 U.S. at 89. Here, the court finds that there is a
19 rational connection between LCC's denial of plaintiff's request for group meeting space seven times
20 a day and the prison's legitimate interests. The prison has a legitimate interest in maintaining prison
21 safety, security, discipline and order, in conserving scarce resources, and in using the activity rooms
22 and chapel to benefit the greatest number of inmates practicable (#66-35, ¶¶ 14, 19, 32). The first
23 *Turner* factor favors defendants.

25 As for the second *Turner* factor, the court finds that the mere fact that LCC prison officials
26 denied plaintiff's request to set aside meeting space for Orthodox Christian group worship seven
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1 times per day did not deny plaintiff “all means of religious expression.” *Shakur*, 514 F.3d at 886.
2 Plaintiff certainly has alternative means by which he can practice his religion. For example, plaintiff
3 may practice his faith privately seven times a day, request a time-slot for Orthodox Christian group
4 worship in the chapel schedule, request clergy visits, attend religious group services with other
5 Christians, obtain approved religious print materials, and borrow books and other materials from the
6 chapel library (#66-33, ¶¶ 22, 61, 68-70). In fact, plaintiff testified that he attends Christian group
7 worship services once or twice a week (#66-1, p. 83). Plaintiff is simply precluded from
8 commandeering a space for Orthodox Christian group worship seven times a day at specified times.
9 The second *Turner* factor favors defendants.
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12 Under the third *Turner* factor, the court considers the “impact accommodation of the asserted
13 constitutional right will have on guards and other inmates, and on the allocation of prison resources
14 generally.” *Turner*, 482 U.S. at 90. Plaintiff requests group meeting space in Housing Unit 3B’s
15 activity room(s). However, plaintiff has not provided the court with evidence of the activity room’s
16 current usage or evidence of the security requirements surrounding plaintiff’s request to use the
17 activity room. Warden LeGrand states that LCC schedules Housing Unit 3B’s activity room to
18 benefit the greatest number of inmates practicable, and that this space is already being used for
19 educational classes, college classes, self-help courses, the barber shop and the laundry pass-out area
20 (#66-35, ¶¶ 32, 25). If LCC permitted plaintiff’s religious group to use the Unit 3B activity room
21 forty-nine times per week, as plaintiff requests, LCC would be forced to cease using this area for
22 other scheduled activities. *Id.* at ¶¶ 26-27. Warden LeGrand opines that if LCC granted plaintiff’s
23 request, other inmates could resent the fact that their education, mental health, self-help, haircuts and
24 other programs were adversely affected, which could increase the risk of harm to both plaintiff and
25 staff. *Id.* at ¶ 29. Warden LeGrand also states that LCC operates with reduced staff in the evening
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1 hours, and there are many nights where there is no floor-officer in the PS unit. *Id.* at ¶ 30. If LCC
2 were to accommodate plaintiff's request for group prayer in the evening, LCC would be forced to
3 pull staff from other critical areas or hire overtime staff to safely supervise these activities. *Id.* at ¶
4 31. Finally, plaintiff testified that there is only one other Orthodox Christian inmate in his housing
5 unit (#66-1, pp. 80-81, 91-92, 167-70). Since inmates from PS are not permitted to mix with inmates
6 in GP, plaintiff's Orthodox Christian faith group has a current population of two inmates. Thus,
7 plaintiff's faith group rightfully ranks lower on the meeting space allocation hierarchy.
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9 The record reflects that accommodating plaintiff's request for Orthodox Christian group
10 worship meeting space seven times per day will adversely affect other inmates, staff, and the
11 allocation of prison resources generally. Accordingly, the third *Turner* factor favors defendants.
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13 The fourth *Turner* factor requires the court to consider whether "there are ready alternatives
14 to the prison's current policy that would accommodate [plaintiff] at *de minimus* cost to the prison."
15 *Shakur*, 514 F.3d at 887. Here, there are no ready alternatives that would accommodate plaintiff's
16 specific request for corporate prayer seven times per day at a *de minimus* cost to LCC. The prison
17 simply cannot be expected to provide plaintiff's religious group with a meeting space every day at 6
18 a.m., 9 a.m., noon, 3 p.m., 6 p.m., 9 p.m. and midnight. The fourth *Turner* factor favors defendants.
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20 Balancing these factors, the court finds that LCC's denial of plaintiff's request for Orthodox
21 Christian corporate prayer meeting space seven times per day at specified hours is reasonably related
22 to the prison's legitimate penological interests. Because plaintiff does not present any factual issues
23 concerning the reasonableness of LCC's denial, the court recommends that summary judgment be
24 granted in defendants' favor on plaintiff's First Amendment corporate prayer claim.
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2. RLUIPA

Plaintiff alleges that defendants' refusal to officially recognize his Orthodox Christian religion places a substantial burden on his religious exercise because it prevents plaintiff from receiving a kosher meat diet and participating in corporate prayer (#60, p. 19). Defendants contend that they did not violate plaintiff's religious rights under RLUIPA on these grounds: (1) for an Orthodox Christian, observing a kosher diet does not constitute a substantial burden and does not meet RLUIPA's statutory definition of "religious exercise" (#66, pp. 12-14, 26 n. 46); (2) denying plaintiff's request for a corporate prayer meeting space seven times a day does not constitute a substantial burden on plaintiff's religious exercise (#66, p. 26); and (3) even if denying plaintiff's request for a corporate prayer meeting space did constitute a substantial burden on plaintiff's religious exercise, defendants have demonstrated a compelling governmental interest in preventing plaintiff from interrupting the services provided to other inmates seven times per day. *Id.* at 26-27.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, provides in relevant part:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). Thus, RLUIPA mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard articulated in *Turner*. *Greene v. Solano County Jail*, 513 F.3d 982, 986 (9th Cir. 2008) (citations omitted).

To establish a RLUIPA violation, the plaintiff bears the initial burden of proving that the defendants' conduct imposed a "substantial burden" on his "religious exercise."

1 *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). Once the plaintiff establishes a
2 substantial burden on his religious exercise, defendants must prove that the burden both
3 furthers a compelling governmental interest and is the least restrictive means of achieving
4 that interest. *Id.* at 995. The Ninth Circuit has set out four factors for the RLUIPA analysis:
5 (1) what “exercise of religion” is at issue; (2) what “burden,” if any, is imposed on that
6 exercise of religion; (3) if there is a burden, whether it is “substantial;” and (4) if there is a
7 “substantial burden,” whether it is justified by a compelling governmental interest and is the
8 least restrictive means of furthering that compelling interest. *Navajo Nation v. U.S. Forest*
9 *Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007), *aff’d en banc*, 535 F.3d 1058, 1068 (9th Cir.
10 2008).

13 Although RLUIPA does not define what constitutes a “substantial burden” on religious
14 exercise, the burden must be more than a mere inconvenience. *Navajo Nation*, 479 F.3d at 1033
15 (internal quotations and citations omitted). The Ninth Circuit has stated that a substantial burden is
16 one that is “‘oppressive’ to a ‘significantly great’ extent.” “That is, a ‘substantial burden’ on
17 ‘religious exercise’ must impose a significantly great restriction or onus upon such exercise.”
18 *Warsoldier*, 418 F.3d at 995 (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d
19 1024, 1034 (9th Cir. 2004)). The burden must prevent the plaintiff “from engaging in [religious]
20 conduct or having a religious experience.” *See Navajo Nation*, 479 F.3d at 1033 (internal citations
21 omitted). In addition, a substantial burden exists when the state, “denies [an important benefit]
22 because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent
23 to modify his behavior and to violate his beliefs.” *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir.
24 2008) (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18
25 (1981) (internal quotations omitted)).

1 RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled
2 by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). Although RLUIPA
3 “bars inquiry into whether a particular belief or practice is ‘central’ to a prisoner’s religion . . . the
4 Act does not preclude inquiry into the sincerity of a prisoner’s professed religiosity.” *Cutter v.*
5 *Wilkinson*, 544 U.S. 706, 725 n.13 (2005).
6

7 Here, the court finds that there is no evidence to indicate that defendants’ refusal to
8 provide plaintiff with a kosher diet and group meeting space for corporate prayer seven times
9 per day places a “substantial burden” on plaintiff’s religious exercise.
10

11 The Seventh Circuit has found that “a prisoner’s religious dietary practice is substantially
12 burdened when the prison forces him to choose between his religious practice and adequate
13 nutrition.” *Nelson v. Miller*, 570 F.3d 868, 869 (7th Cir. 2009). As stated above, the court finds that
14 plaintiff’s assertion that he requires a kosher diet to satisfy his Orthodox Christian religious needs is
15 not a sincerely held religious belief. Although plaintiff credibly testified that the Orthodox Christian
16 religion requires its adherents to “abstain from blood and to abstain from things strangled,” plaintiff
17 could not explain why kosher certification was necessary to meet these requirements (#66-1, p. 107).
18 In addition, on October 14, 2012, plaintiff asked to be removed from the alternative meatless diet,
19 and to be placed back on the mainline-menu diet, which contains non-kosher meat products (#75-2,
20 p. 4). Plaintiff states that this change has allowed him to trade his non-kosher meat for fresh fruit
21 and vegetables (#96, p. 21). It appears that plaintiff has worked out an acceptable diet that comports
22 with his religion and is not forced “to choose between his religious practice and adequate nutrition.”
23 *Nelson*, 570 F.3d at 869. Accordingly, the court finds that LCC’s refusal to provide plaintiff with a
24 kosher diet or kosher meat diet does not violate plaintiff’s statutory rights under RLUIPA.
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28 Likewise, LCC’s refusal to provide plaintiff with a group meeting space for corporate prayer

seven times per day (forty-nine times per week) does not place a “substantial burden” on plaintiff’s religious exercise. Unlike *Greene*, where there was an “outright ban” on the plaintiff’s chosen religious exercise, here, Chaplain Garcia and defendant Carpenter did not place a total ban on Orthodox Christian group worship. They merely denied plaintiff’s request to commandeer group meeting space seven times per day. Plaintiff has ample opportunity to pursue his faith in other ways. Plaintiff may practice his faith privately seven times per day, request a time-slot for group worship in the Chapel schedule, request clergy visits, attend religious group services with other Christians, and borrow books and other religious materials from the chapel library (#66-33, ¶¶ 22, 61, 68-70). Accordingly, plaintiff has failed to make a showing that the denial of his corporate prayer request amounts to a substantial burden on his religious exercise.

Plaintiff has failed to prove that defendants’ refusal to provide him with a kosher diet and group meeting space for corporate prayer seven times a day prevents him from “engaging in religious conduct or having a religious experience.” *Navajo Nation*, 535 F.3d at 1091. Accordingly, the court recommends that summary judgment be granted in defendants’ favor on plaintiff’s RLUIPA claims.¹⁴

3. Fourteenth Amendment Equal Protection

Plaintiff alleges that defendants violated his Fourteenth Amendment right to equal protection when they denied plaintiff’s requests for a kosher diet and corporate prayer (#86, p. 18). Plaintiff argues that NDOC’s practice of providing kosher meals only to Jewish inmates is an improper race-based policy (#60, p. 22; #75-4, p. 10). Plaintiff further argues that defendants’ refusal to provide plaintiff with a kosher diet constitutes “palpable discrimination,” especially since LCC

¹⁴ Defendants are also entitled to summary judgment on plaintiff’s RLUIPA claim for monetary damages because plaintiff cannot recover monetary damages against defendants sued in their individual or official capacities. *See Mauwee v. Donat*, 2009 WL 3062787, at *6 (D.Nev. Sept. 18, 2009) (citing *Rendelman v. Rouse*, 569 F.3d 182, 184 (4th Cir. 2009)).

1 accommodates Jewish inmates in their kosher diet, Muslim inmates in their Ramadan fast, and
2 Roman Catholic inmates during Lent (#96, p. 29).

3
4 Defendants contend that NDOC's prior kosher diet policy is not race-based, as the policy
5 included those inmates who converted to Judaism—without regard to their ancestral ethnicity,
6 heritage or race (#66, pp. 24-25). Defendants also contend that Orthodox Christian and Jewish
7 inmates are dissimilar with respect to their religious dietary requirements, such that they cannot be
8 compared in an unlawful discrimination analysis (#75, p. 11). Finally, defendants contend that LCC
9 schedules group meeting space with secular goals in mind—not with an intent to favor one religious
10 group over another. *Id.* at 24.

12 The Equal Protection Clause of the Fourteenth Amendment requires the State to treat all
13 similarly situated people equally. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432,
14 439 (1985). Under the Equal Protection Clause, prisoners are protected from invidious
15 discrimination based on race, *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974), and religion. *See*
16 *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997), *abrogated on other grounds by Shakur*, 514
17 F.3d at 884-85. To establish a violation of the Equal Protection Clause, a plaintiff must show that
18 prison officials intentionally discriminated against him on the basis of his religion by failing to
19 provide him with a reasonable opportunity to pursue his faith compared to other similarly situated
20 religious groups. *Cruz v. Beto*, 405 U.S. 319, 321-22 (1972); *Shakur*, 514 F.3d at 891; *Serrano v.*
21 *Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003), *cert. denied*, 543 U.S. 825 (2004). Once the plaintiff
22 makes this prima facie showing, the court must apply the *Turner* factors. *See Shakur*, 514 F.3d at
23 891; *see also Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004) (citations omitted) (“In the prison
24 context, however, even fundamental rights such as the right to equal protection are judged by a
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1 standard of reasonableness—specifically, whether the actions of prison officials are ‘reasonably
2 related to legitimate penological interests.’”).

3 To defeat defendants’ motion for summary judgment, plaintiff must first set forth specific
4 facts showing that there is a genuine issue as to whether he was afforded a reasonable opportunity to
5 pursue his faith as compared to prisoners of other faiths, and that “officials intentionally acted in a
6 discriminatory manner.” *Freeman*, 125 F.3d at 737. “Intentional discrimination means that a
7 defendant acted at least in part because of a plaintiff’s protected status.” *Maynard v. City of San*
8 *Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994).

9 Plaintiff has failed to proffer any evidence showing that defendants intentionally
10 discriminated against him based on either his race or religion. Plaintiff’s allegation that defendants
11 allow plaintiff, Jewish inmates and Muslim inmates to engage in different practices does not
12 evidence discriminatory intent, as defendants are only required to ensure that members of different
13 faith groups receive an equal opportunity to pursue their faith—not identical practices. In *Cruz v.*
14 *Beto*, the Supreme Court confirmed that not every religious group within a prison need have
15 identical facilities or personnel. 405 U.S. at 322 n. 2. Instead, prisons must make “good faith
16 accommodation of the [prisoner’s] rights in light of practical considerations.” *Allen v. Toombs*, 827
17 F.2d 563, 569 (9th Cir. 1987) (citation omitted). LCC officials do not need to duplicate every
18 religious benefit provided so that all religions are treated exactly the same.

19 There is nothing in the record, other than plaintiff’s bare allegations, that would tend to prove
20 that LCC’s kosher meal policy was implemented with an intent to discriminate against the Orthodox
21 Christian population. There is also nothing in the record that would tend to prove that LCC denied
22 plaintiff’s request for corporate prayer meeting space seven times a day with an intent to
23 discriminate against the Orthodox Christian population. Having failed to make out a prima facie

1 case of intentional discrimination, plaintiff is not entitled to prevail upon his Fourteenth Amendment
2 equal protection claims.¹⁵

3
4 **III. CONCLUSION**

5 Based on the foregoing and for good cause appearing, the court concludes that defendants are
6 entitled to summary judgment in their favor, as there are no genuine issues of material fact for trial.
7 The parties are advised:

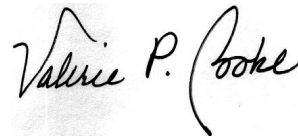
8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
9 the parties may file specific written objections to this Report and Recommendation within fourteen
10 days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and
11 Recommendation” and should be accompanied by points and authorities for consideration by the
12 District Court.
13

14 2. This Report and Recommendation is not an appealable order and any notice of appeal
15 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s judgment.
16

17 **IV. RECOMMENDATION**

18 **IT IS THEREFORE RECOMMENDED** that plaintiff’s motion for summary judgment
19 (#60) be **DENIED** and defendants’ cross-motion for summary judgment (#66) be **GRANTED**.

20 **DATED:** July 10, 2013.

21 

22 **UNITED STATES MAGISTRATE JUDGE**

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¹⁵ Because the court recommends that summary judgment be granted in defendants’ favor, the court will not address defendants’ personal participation, supervisory liability or qualified immunity defenses.